

Columbia Law School Scholarship Archive

Faculty Scholarship

Faculty Publications

2007

The Best Defense: Why Elected Courts Should Lead Recusal Reform

Deborah Goldberg
deborah.goldberg@nyu.edu

James J. Sample
Maurice A. Deane School of Law, james.sample@nyu.edu

David Pozen
Columbia Law School, dpozen@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Judges Commons](#)

Recommended Citation

Deborah Goldberg, James J. Sample & David Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, WASHBURN LAW JOURNAL, VOL. 46, P. 503, 2007 (2007).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/1481

This Working Paper is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact cls2184@columbia.edu.

The Best Defense: Why Elected Courts Should Lead Recusal Reform

Deborah Goldberg,* James Sample,** and David E. Pozen***

I. INTRODUCTION

In recent years, we have seen an escalation of attacks on the independence of the judiciary. Government officials and citizens who have been upset by the substance of judicial decisions are increasingly seeking to rein in the courts by limiting their jurisdiction over controversial matters,¹ soliciting pre-election commitments from judicial candidates,² and drafting ballot initiatives with sanctions for judges who make unpopular rulings.³ Many of these efforts betray ignorance at best, or defiance at worst, of traditional principles of separation of powers and constitutional protections against tyranny of the majority.

The attacks are fueled in part by the growing influence of money in judicial elections and the dismantling of codes of judicial ethics that once helped to preserve the distinctive character of the judiciary, even during the course of campaigns for the bench. The unabated accelera-

* Deborah Goldberg is the Democracy Program Director of the Brennan Center for Justice at New York University School of Law. She is a graduate of Harvard Law School and holds a Ph.D. in philosophy from The Johns Hopkins University. This article is an edited version of a lecture Ms. Goldberg delivered at the Washburn University School of Law's Shamberg Symposium on November 1, 2006. Ms. Goldberg thanks Dean William J. Rich for the invitation to participate in the Symposium and the editors of the *Washburn Law Journal* for their assistance in preparing the speech for publication. She also acknowledges the extensive contributions of her co-authors, without whose thorough research and skillful drafting neither the lecture nor this article would have been possible.

** James Sample is counsel in the Democracy Program of the Brennan Center for Justice at the New York University School of Law. He holds a J.D. from Columbia Law School, where he was a Harlan Fiske Stone and James Kent Scholar.

*** David Pozen was a 2006 summer intern in the Democracy Program of the Brennan Center for Justice at New York University School of Law. He expects to earn his J.D. from Yale Law School in 2007.

1. See David Rottman, *The State Courts in 2005: A Year of Living Dangerously*, in 38 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 237, 237 (2006) (summarizing state court jurisdiction-stripping measures), available at http://www.ncsconline.org/d_research/Documents/YearOfLivingDangerously.pdf.

2. See, e.g., *Kan. Judicial Watch v. Stout*, 440 F. Supp. 2d 1209 (D. Kan. 2006) (discussing the questionnaire submitted by the plaintiff to judicial candidates); Barbara E. Reed, *Tripping the Rift: Navigating Judicial Speech Fault Lines in the Post-White Landscape*, 56 MERCER L. REV. 971, 996-1016 (2005) (documenting the growing role of judicial candidate questionnaires and providing examples).

3. The Judicial Accountability Initiative Law ("J.A.I.L. 4 Judges") was on the ballot in South Dakota in 2006. It would have created a Special Grand Jury empowered to sanction judges who made decisions it found unacceptable. Voters rejected the ballot measure by a margin of seventy-eight points (eighty-nine percent to eleven percent).

tion of those trends erodes public confidence in the ability of courts to serve as fair arbiters of disputes. Moreover, the undifferentiated cynicism bred by those trends tars all courts—elective and appointive, state and federal—with the same brush, undermining resistance even to extreme anti-judicial rhetoric and activism. The threat is sufficiently serious to command attention at the highest levels of the judiciary.⁴

The time has come for elected courts, which are at the eye of the storm, to replace anxiety about declining public trust with active measures to restore it. Without a meaningful response to legitimate concerns induced by their own campaign-related behavior, judges cannot expect the public to rise to their defense when their authority is questioned on illegitimate grounds. To protect judicial independence, generally, elected courts must embrace the public demand for accountability—not by yielding to pressure on hot-button issues, but by recognizing that with independence comes a duty to preserve both the reality and appearance of justice. Elected courts must demonstrate their accountability for the decisions they make by more aggressively distancing themselves from situations in which their fairness and impartiality might reasonably be questioned.

Readers familiar with the American Bar Association's Model Code of Judicial Conduct will recognize in this exhortation a call for stiffer disqualification or recusal policies.⁵ Canon 3E(1) of that Code, which has been adopted in some form by nearly every state and by Congress, provides: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." This article suggests that current disqualification doctrines and procedures are inadequate to preserve public trust and that, to safeguard their own independence, courts should consider a variety of reforms. Part II describes trends undermining public confidence and explains how, in two recent decisions, the United States Supreme Court has both exacerbated the impact of those trends and absolved itself of responsibility for providing a solution. In Parts III and IV, respectively, we offer a brief his-

4. Recently retired Justice Sandra Day O'Connor has noted that attacks on the judiciary are now being launched by judges themselves:

Earlier this year, Alabama Supreme Court Justice Tom Parker excoriated his colleagues for faithfully applying the Supreme Court's precedent in *Roper v. Simmons*, which prohibited imposition of the death penalty for crimes committed by minors. Offering a bold reinterpretation of the Constitution's supremacy clause, Justice Parker advised state judges to avoid following Supreme Court opinions "simply because they are 'precedents.'" Justice Parker supported his criticism of "activist federal judges" by asserting that "the liberals on the U.S. Supreme Court . . . look down on the pro-family policies, Southern heritage, evangelical Christianity, and other blessings of our great state."

Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18.

5. Technically, there is a difference between disqualification and recusal—disqualification is mandatory, recusal is voluntary—but the difference is often blurred because in the many jurisdictions in which judges adjudicate challenges to their own qualification to sit, disqualification functions essentially as recusal. In this article, we use the terms interchangeably but distinguish between mandatory and voluntary removal of a judge from a case.

tory of disqualification law and an explanation why, as it is currently interpreted, it cannot solve the urgent problems of today. Finally, Part V outlines ten proposals for strengthening recusal that acknowledge the public's legitimate demand for accountability while protecting the judiciary's institutional need for independence.

II. JUDICIAL ELECTIONS AND CONFIDENCE IN THE COURTS

The Supreme Court has recognized that there is a “fundamental tension between the ideal character of the judicial office and the real world of electoral politics.”⁶ But two of the Court's recent decisions have markedly exacerbated that tension. *Republican Party of Minnesota v. White*⁷ is responsible for undermining longstanding norms that protected the distinctive character of judicial campaigning. *Avery v. State Farm Mutual Automobile Insurance Co.*⁸ looks the other way as the growing influence of money on judicial campaigns erodes public confidence in fair and impartial courts. Together, the two decisions place the onus on elected courts to strengthen recusal rules and practices.

A. *Republican Party of Minnesota v. White and Its Aftermath*

At issue in *White* was a particular clause of the Minnesota Code of Judicial Conduct—the “Announce Clause”—which prohibited any candidate for judicial office from “announc[ing] his or her views on disputed legal or political issues.”⁹ The Supreme Court held, five votes to four, that the Announce Clause unconstitutionally abridged the First Amendment rights of judicial candidates. Justice Scalia's majority opinion recognized that, under some definitions, judicial impartiality might be a sufficiently compelling state interest to justify restraints on speech, but it concluded that the Announce Clause was not narrowly tailored to serve that interest.¹⁰ The majority was unpersuaded by arguments that statements made during campaigns carry a special threat to the open-mindedness of judges.¹¹ Suggesting that prospective judges might dissemble with impunity on the campaign trail, Justice Scalia dismissed fears that judges would regard such statements as binding and thereby

6. *Chisom v. Roemer*, 501 U.S. 380, 400 (1991).

7. 536 U.S. 765 (2002).

8. 126 S. Ct. 1470 (2006).

9. *White*, 536 U.S. at 770.

10. Justice Scalia considered three definitions of “impartiality”: “lack of bias for or against either party,” “lack of preconception in favor of or against a particular legal view,” and open-mindedness. *Id.* at 775-81. For a critique of Justice Scalia's proposed definitions, see J.J. GASS, AFTER *WHITE*: DEFENDING AND AMENDING CANONS OF JUDICIAL ETHICS 6-7 (2004), available at <http://www.brennancenter.org/dynamic/subpages/ji4.pdf>.

11. See *White*, 536 U.S. at 780-81.

violate litigants' due process rights to a fair hearing.¹² In any event, suggested Justice Kennedy in concurrence, such concerns might be addressed through "more rigorous" recusal standards.¹³

The *White* Court discounted concerns that overturning the Announce Clause would loose havoc on judicial elections. In 2002, only nine states included Minnesota's version of the Clause in their codes of judicial ethics,¹⁴ so the impact of *White* as a strictly legal matter was limited. Moreover, the majority expressly stated that that "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."¹⁵ But those technicalities made little difference in the real world of judicial elections. *White* unquestionably opened the door, as both a practical and jurisprudential matter, to forces seeking to benefit from highly politicized courts.

The impact on the conduct of campaigns was immediate and unmistakable. Candidates in many states received questionnaires soliciting their positions on controversial topics such as abortion and equal marriage rights for partners of the same sex.¹⁶ Although the candidates had a legal right not to answer, without any canon enforcing common ethical standards, the competitive pressure of campaigns made it exceedingly difficult to refuse. Moreover, voters wanted to understand how prospective judges were likely to approach the pressing issues of the day, and some candidates for the bench were eager to prove their allegiance to energized voting blocs and potential donors. The press not only failed to warn of the risks to impartial decision-making presented by campaign promises, but also, in some instances, actively chided candidates for being unwilling to take stands on whole categories of cases. The public interest in judges who could fairly hear both sides of a case increasingly was overwhelmed by special interests in judges who would reliably tilt the scales.

Adding to the practical pressures created by *White* was a series of lawsuits seeking to expand the decision's reach. Candidates, political parties, and interest groups promoting more politicized judicial elections challenged an array of additional canons that constrained campaign conduct. Three categories of canons were targets of litigation in the years immediately following *White*.

First, codes of judicial ethics in many states ban "pledges or promises of conduct in office other than the faithful and impartial perform-

12. *See id.*

13. *See id.* at 794 (Kennedy, J., concurring) ("[States] may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.").

14. *See Reed, supra* note 2, at 982.

15. *White*, 536 U.S. at 783.

16. *See supra* note 2 and accompanying text.

ance of the duties of the office.”¹⁷ The purpose of the “Pledges or Promises Clause” is to prevent promises by judicial candidates that “impair the integrity of the court by making the candidate appear to have pre-judged an issue without benefit of argument or counsel, applicable law, and the particular facts presented in each case.”¹⁸ Based on the same rationale, state canons also typically include a “Commit Clause,” which prohibits “statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”¹⁹ Taking aim at these provisions, some interest group questionnaires offered a “Decline to Respond” option indicating refusal to answer because of the canons, use of which plaintiffs then cited in lawsuits challenging the Pledges or Promises and Commit Clauses.²⁰ While the *White* majority recognized that campaign promises might “pose a special threat to open-mindedness,”²¹ courts facing challenges to Pledges or Promises and Commit Clauses in the wake of *White* have reached mixed conclusions.²²

Courts are also split on the constitutionality of canons that prohibit judges and judicial candidates from directly soliciting campaign contributions. Prior to *White*, such bans generally were upheld because of the strong due process interests the bans served,²³ and since *White* two courts have agreed.²⁴ The Arkansas Supreme Court most recently explained: “We do not believe anyone can seriously argue that a judge personally soliciting campaign contributions from attorneys having cases before him or her should be permissible.”²⁵ But the Eleventh Circuit

17. See, e.g., MICH. CODE OF JUDICIAL CONDUCT Canon 7B.1.c (1994); OHIO CODE OF JUDICIAL CONDUCT Canon 7(B)(2)(c) (1997).

18. Ackerman v. Ky. Judicial Ret. & Removal Comm’n, 776 F. Supp. 309, 315 (W.D. Ky. 1991).

19. See, e.g., KAN. CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (2006); PA. CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (2005).

20. See, e.g., Ind. Right to Life, Inc. v. Shepard, 463 F. Supp. 2d 879, 883 (N.D. Ind. 2006), *appeal docketed*, No. 06-4333 (7th Cir. Dec. 22, 2006); Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209 (D. Kan. 2006), *appeal docketed*, No. 06-3290 (10th Cir. Aug. 17, 2006); see also Duwe v. Alexander, No. 06-cv-00766, 2007 WL 840121 (W.D. Wis. Feb. 13, 2007) (using the inability to obtain answers to questionnaires as grounds for challenging canons).

21. Republican Party of Minn. v. White, 536 U.S. 765, 780 (2002).

22. Compare Ala. Right to Life Political Action Comm. v. Feldman, 380 F. Supp. 2d 1080, 1083 (D. Ala. 2005) (striking down Alaska’s Pledges or Promises Clause), and N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1039 (D.N.D. 2005) (“A careful reading of the majority opinion in *White* makes it clear that the ‘pledges and promises clause’ . . . [is] not long for this world.”), with Wolfson v. Brammer, No. 3:06-cv-02357, 2006 U.S. Dist. LEXIS 80770 (D. Ariz. Nov. 3, 2006) (denying a preliminary injunction in a challenge to Arizona’s Pledges or Promises Clause), *In re Kinsey*, 842 So. 2d 77, 87 (Fla. 2003) (upholding Florida’s Pledges or Promises Clause), and *In re Watson*, 794 N.E.2d 1, 6 (N.Y. 2003) (upholding New York’s Pledges or Promises Clause).

23. See, e.g., Stretton v. Disciplinary Bd. of the Sup. Ct. of Pa., 944 F.2d 137, 146 (3d Cir. 1991) (“[W]e cannot say that the state may not draw a line at the point where the coercive effect, or its appearance, is at its most intense—personal solicitation by the candidate.”); *In re Fadeley*, 802 P.2d 31, 40 (Or. 1991) (explaining that the ban mitigates not only the danger of the appearance of quid pro quo corruption, but also the prospect of coercion of lawyers and litigants into contributing).

24. Simes v. Ark. Judicial Discipline & Disability Comm’n, No. 06-725, 2007 WL 184801 (Ark. Jan. 25, 2007); *In re Dunleavy*, 838 A.2d 338 (Me. 2003).

25. Simes, No. 06-725, 2007 WL 184801, at *6.

struck down Georgia's solicitation canon, baldly asserting "that the Supreme Court's decision in *White* suggests that the standard for judicial elections should be the same as the standard for legislative and executive elections."²⁶ The Eleventh Circuit's flagrant disregard for Justice Scalia's cautionary words²⁷ adds to the uncertain future of the canons.

Finally, various canons designed to reduce partisanship in judicial elections or to constrain political activity by judges have come under fire. On remand from the Supreme Court in *White*, the Eighth Circuit struck down clauses in Minnesota's canons that were designed to preserve the non-partisanship of the state's judicial elections.²⁸ Other courts, however, have upheld political activity canons designed to insulate sitting judges from politics unrelated to their own campaigns for re-election.²⁹

The increasing and often successful attacks on this wide array of canons have left state bodies charged with regulating judicial conduct in disarray, especially when applying canons applicable to campaign conduct.³⁰ As one trial court observed: "To say that there is considerable uncertainty regarding the scope of the Supreme Court's decision in *White* is an understatement. . . . It has caused, and will continue to cause, considerable uncertainty and consternation on the part of judicial candidates."³¹ The broader *White*'s scope becomes, the greater will be the erosion of the traditional buffers between state judges and improper outside influences.

Among such outside influences, perhaps the greatest cause of consternation is large campaign contributions from attorneys and parties with business before state courts. Wealthy special interests that are frequent parties in litigation now can condition financial support for a can-

26. *Weaver v. Bonner*, 309 F.3d 1312, 1321 (11th Cir. 2002); *see also* *Republican Party of Minn. v. White*, 416 F.3d 738, 765-66 (8th Cir. 2005) (holding that Minnesota's solicitation clause was unconstitutional to the extent that it prohibited candidates from signing solicitation letters and making campaign appeals before large groups).

27. *See supra* note 15 and accompanying text.

28. *See White*, 416 F.3d at 754-63.

29. *See, e.g., In re Dunleavy*, 838 A.2d 338 (Me. 2003) (upholding the requirement that a judge resign before running for another office); *In re Raab*, 793 N.E.2d 1287 (N.Y. 2003) (upholding restrictions on activities supporting campaigns other than the candidate's own).

30. As a result, even in some states where canons have not been challenged in court, the fear of litigation has spawned the adoption of anticipatory amendments weakening the canons. In July 2002, for example, a member of North Carolina's Supreme Court served as the master of ceremonies for a Republican Party fundraising event and spoke in support of the Party's candidates. At the time, the action violated the state's partisan political activity canon, as the justice later acknowledged. Less than two months later, however, the North Carolina Supreme Court amended the state's canons to permit judges to "attend, preside over, and speak at any political party gathering, meeting or other convocation" and engage in other political activity. *GASS, supra* note 10, at 1. North Carolina's justices told one reporter that they had amended the state's canons so as "to get ahead of a trend in federal court rulings and to avoid lawsuits over the state requirements." Matthew Eisley, *Code Loosens Grip on Judges*, RALEIGH NEWS & OBSERVER, Sept. 20, 2003, at B1. Likewise, the Georgia Supreme Court dropped Georgia's Pledges or Promises Clause and its "ban on statements that 'appear to commit' a candidate." *See GASS, supra* note 10, at 4.

31. *N.D. Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1041-42 (D.N.D. 2005).

didate on the candidate's willingness to take a particular stand on contested legal or policy issues that will come before the court. Candidates seeking campaign contributions can solicit support by announcing their allegiance to positions that prospective donors hope to advance through the courts. Campaigns that once calmly focused on the qualifications and experience of the candidates have been transformed into multi-million-dollar pitched battles, complete with highly personal attack ads.³² Often, the interest groups that are fueling the skyrocketing spending—principally the combatants in the war over “tort reform”—are not transparent to the voters, who are instead courted through expensive television advertisements identifying candidates as “pro-life” or criticizing their decisions in criminal cases.³³ Voters may be able to obtain more information about candidates' views, but the negative character of the advertising and the extraordinary sums involved in the campaigns are undermining trust in judges.

In sum, when canons regulating political activity are stricken, the consequences are real. Given the dynamics of modern political contests, the candidates face a prisoner's dilemma: either they comport themselves in a manner that may be inconsistent with impartiality or risk almost certain defeat. The effect is a surge in judicial campaign conduct (and other judicial conduct) that threatens judicial impartiality and the appearance of such impartiality. With due process interests in severe jeopardy across the states, the recent petition for certiorari in *Avery* offered hope that the Supreme Court would step in to safeguard them.

B. The Meaning of Avery v. State Farm Mutual Automobile Insurance Co.

One of the most notorious judicial elections in recent history presented an opportunity for the Supreme Court to stem the unfortunate tide loosed by *White*, but the Court declined to take action. In *Avery*, the plaintiffs sought recusal of a judge who received substantial financial support from individuals and organizations closely associated with the defendant. To appreciate the import of the refusal to recuse, and the Supreme Court's refusal to review that decision, requires some under-

32. For a detailed account of these trends, see DEBORAH GOLDBERG ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2004* (2005), available at http://www.brennancenter.org/dynamic/subpages/download_file_10569.pdf.

33. In the 2006 elections, for example, interest groups in the state of Washington spent more than a million dollars to influence Supreme Court races. One sponsor, “Americans Tired of Lawsuit Abuse,” was plainly a group supporting business interests, but its ad featured the mother of a three-year-old crime victim blaming the incumbent judge for the early release of her son's murderer. See Brennan Center for Justice at NYU School of Law, *STSUPCT/WA Atla Alexander Denouncement*, http://brennancenter.org/dynamic/subpages/download_file_37254.pdf (last visited Apr. 10, 2007) (reproducing the ad's storyboard).

standing of the underlying facts.³⁴

In May 2003, the Illinois Supreme Court heard oral arguments in *Avery*, an appeal from a class action verdict against State Farm of over \$1 billion, including \$456 million in contractual damages. The appeal was not decided until after the November 2004 election, so the matter was pending throughout the 2004 campaign for a seat on the Illinois Supreme Court.

Recognizing the high stakes of the race, a number of business groups and the Republican Party contributed heavily to the campaign of then-Circuit Judge Lloyd Karmeier, while the plaintiffs' bar and the Democratic Party contributed heavily to the campaign of then-Illinois Appellate Judge Gordon Maag. Together they raised \$9.3 million in political contributions, a national record for a judicial election.³⁵ Karmeier received more than \$2 million from the Chamber of Commerce and more than \$350,000 in direct contributions from State Farm's employees, lawyers, and others involved with the company or the case.³⁶ Maag, meanwhile, received nearly equal support from trial lawyers and labor organizations.

The funds financed a contest illustrating all of the ill effects unleashed by *White*. In his own campaign ads, Karmeier all but promised to "fix" the "medical malpractice crisis" of "phony lawsuits" against doctors and hospitals. His interest group supporters accused Maag of taking half a million dollars from trial lawyers. In turn, ads run by Maag's backers claimed that Karmeier was "in the pocket of big business" and HMOs, which could count on Karmeier's support "as they outsource American jobs and eliminate healthcare for workers." Karmeier boasted that he presided over "the first death penalty conviction in St. Claire County during the modern era," while the Democratic Party accused him of leniency toward a child molester.³⁷

In the end, Karmeier won both the fundraising battle and the election. Karmeier described the expense of the campaign as "obscene" and expressed unease about its impact on public trust in the courts, but his concern for appearances waned almost immediately upon election. Once seated on the Illinois high court, he refused to recuse himself from the *Avery* appeal. Karmeier then cast the deciding vote on the breach of contract claims, overturning that verdict against State Farm. The public, not to mention the opposing litigants, could be forgiven for ques-

34. The following discussion of *Avery* draws on Brief of Amici Curiae 12 Organizations Concerned About the Influence of Money on Judicial Integrity, Impartiality, and Independence in Support of Petitioners, *Avery v. State Farm Mut. Auto. Ins. Co.*, 126 S. Ct. 1470 (2006) (No. 05-842) [hereinafter *Avery* Brief], and GOLDBERG ET AL., *supra* note 32, at 18-19, 26-27.

35. See GOLDBERG ET AL., *supra* note 32, at 18.

36. Petition for a Writ of Certiorari at 8, *Avery*, 126 S. Ct. 1470 (No. 05-842).

37. Storyboards, providing video clips at four-second intervals and the full script of the ads, may be found at http://www.brennancenter.org/dynamic/subpages/download_file_47458.pdf.

tioning whether justice was truly served.³⁸

Was Justice Karmeier's decision unbiased? Very possibly yes, but we will never know. Overshadowing the merits of his decision is a single stark fact: without Karmeier's vote, State Farm would have faced further proceedings on claims valued at up to \$456 million. That result is either a coincidence or an impressive rate of return on State Farm's investment. Because we cannot know which it is, public trust in the courts invariably suffers.³⁹

The United States Supreme Court could have stepped in to restore public confidence. It was asked to review Karmeier's decision to sit on the case and to reevaluate whether due process required recusal under such extreme circumstances, but the Court declined review.⁴⁰ *Avery* closed the door, at least for the time being, to a claim that the real or apparent bias created by large campaign contributions violates the right to due process under the federal Constitution. And if the circumstances of *Avery* could not persuade the Court to intervene, it is even less likely that the Court will do so when campaign statements undermine confidence in fair and impartial courts. *Avery* thus leaves the responsibility for preserving the reality and appearance of impartial justice in elective

38. While it is impossible to prove the effects of campaign contributions on judicial decision-making, a growing body of empirical evidence has found a significant correlation between the sources of a judge's funds and the likelihood of outcomes favorable to those sources. See, e.g., Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 601-29 (2002) (finding a strong correlation between Alabama Supreme Court justices' votes in arbitration cases and the sources of their campaign funding); Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1 (reporting that over a twelve-year period Ohio Supreme Court justices voted in favor of their contributors more than seventy percent of the time); see also RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 6.4.1, at 180 (1996) ("While no empirical research appears to have been conducted on whether judicial campaign contributions have actually influenced the outcomes of any cases, many people—including many judges—clearly believe that such is the case.") (internal citations omitted).

39. See James Sample, *The Campaign Trial: The True Cost of Expensive Court Seats*, SLATE, Mar. 6, 2006, <http://www.slate.com/id/2137529/>; see also Brief for Business and Professional People for the Public Interest and Citizen Action/Illinois as Amici Curiae in Support of Petitioners at 2-5, *Price v. Philip Morris Inc.*, 127 S. Ct. 685 (2006) (No. 06-465) (explaining that Justice Karmeier also recently cast the deciding vote in reversing a \$10.1 billion judgment against Philip Morris USA, a company that, along with a business lobbying group backing it, reportedly spent more than \$1 million supporting Karmeier in the 2004 election); Editorial, *Buying Justice?*, ST. LOUIS POST-DISPATCH, Dec. 20, 2005, at B8 ("[T]he juxtaposition of gigantic campaign contributions and favorable judgments for contributors creates a haze of suspicion over the highest court in Illinois. . . . Although Mr. Karmeier is an intelligent and no doubt honest man, the manner of his election will cast doubt over every vote he casts in a business case. This shakes public respect for the courts and the law—which is a foundation of our democracy.").

40. Two of the authors of this article contributed to an amicus brief co-signed by the Brennan Center for Justice, the Campaign Legal Center, and ten other organizations in support of certiorari in *Avery*. See *Avery* Brief, *supra* note 34. The brief asserted that the case "present[ed] an important opportunity for the Court to provide guidance as to the circumstances in which the Due Process Clause of the Fourteenth Amendment requires recusal." *Id.* at 2.

It should be noted that, while the potential harms raised by large campaign contributions apply only to state judicial elections, many of the due process protections provided by the canons also apply in the context of appointed state courts. As in the more dramatic context of elective judiciaries, the current uncertainties surrounding those due process protections also militate in favor of guidance as to the circumstances in which due process may mandate recusal.

state courts squarely in the hands of those courts.

With the canons of judicial conduct looking increasingly precarious in the wake of *White*, courts and litigants are left with precious few reliable mechanisms to safeguard the constitutional right to due process. Recusal is one such remaining safeguard, and, because it is tailored to the specific factual circumstances of the case at issue, it does not trigger the same First Amendment scrutiny as canons limiting political speech.⁴¹ There is nothing radical about using recusal in this way; to the contrary, proponents of enhanced recusal and disqualification can draw on a long and venerable history.

III. A BRIEF HISTORY OF JUDICIAL DISQUALIFICATION IN THE UNITED STATES

The concept and practice of judicial disqualification are of ancient vintage. Under medieval Jewish law, judges were barred from participating in any case in which a litigant was a friend, kinsman, or someone they disliked.⁴² The Roman Code of Justinian went further, permitting parties to remove judges for mere “suspicion” of bias.⁴³ While the civil law ultimately incorporated the Justinian template into its system of “recusation,”⁴⁴ still operative in many countries today, the common law took a much more constricted approach: “a judge was disqualified for direct pecuniary interest and for nothing else.”⁴⁵ Early English courts distinguished between a judge’s interests and his biases, prejudices, or affinities, and categorically rejected the latter as grounds for disqualification. Into the nineteenth century, the guiding—and virtually exclusive—precept of Anglo-American disqualification jurisprudence, espoused by Lord Coke in *Dr. Bonham’s Case* and seconded by Blackstone, was that “[n]o man shall be a judge in his own case.”⁴⁶ In all

41. Drawing on Justice Kennedy’s concurrence in *White*, courts that have invalidated canons regulating campaign speech, fundraising, or political activity have upheld canons mandating disqualification when impartiality might reasonably be questioned. See, e.g., *Ind. Right to Life, Inc. v. Shepard*, 463 F. Supp. 2d 879, 883 (N.D. Ind. 2006), *appeal docketed*, No. 06-4333 (7th Cir. Dec. 22, 2006); *Kan. Judicial Watch v. Stout*, 440 F. Supp. 2d 1209 (D. Kan. 2006), *appeal docketed*, No. 06-3290 (10th Cir. Aug. 17, 2006); *Ala. Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080, 1083 (D. Ala. 2005); *N.D. Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1039 (D.N.D. 2005); *Family Trust Found. of Ky. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004).

42. See FLAMM, *supra* note 38, § 1.2.1, at 6 (citing THE CODE OF MAIMONIDES, BOOK XIV: THE BOOK OF JUDGES 68-70 (Abraham M. Herschman trans., Yale Univ. Press 1949)); John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 248 n.65 (1987) (same).

43. See FLAMM, *supra* note 38, § 1.2.1, at 6 (summarizing the Justinian system); Harrington Putnam, *Recusation*, 9 CORNELL L.Q. 1, 3 n.10 (1923) (translating the relevant provision of Justinian’s *Corpus Juris Civilis*).

44. See FLAMM, *supra* note 38, § 1.2.1-2, at 6-7; Putnam, *supra* note 43, at 3.

45. John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947).

46. *Dr. Bonham’s Case*, (1610) 77 Eng. Rep. 646, 652 (K.B.) (“*aliquis non debet esse Judex in propria causa . . .*”); see also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986) (describing judicial disqualification at common law); Frank, *supra* note 45, at 609-12 (same); Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 HARV. L. REV. 1435, 1435-36 (1966) (same). Blackstone famously wrote that “the law will not suppose a possibility of bias or favour in a judge, who is already

other circumstances, judges had a “duty to sit.”⁴⁷

Since that time, American rules on judicial disqualification have been steadily liberalized in three main ways.⁴⁸ First, the list of disqualifying factors has expanded far beyond direct financial interest, so that in every jurisdiction it now encompasses bias, prejudice, partiality, familial and professional connections to the parties and their lawyers, knowledge of disputed evidentiary facts, and improper conduct.⁴⁹ Second, the rules have moved from requiring evidence of actual bias or interest for a claim of disqualification, to requiring only the appearance thereof.⁵⁰ And third, judges are now asked to evaluate these claims under objective rather than subjective standards—recusing themselves automatically in certain instances, adopting the perspective of a “reasonable person” in all others.⁵¹

Through its Model Code of Judicial Conduct, first introduced in 1972 and adopted in some form by nearly every state and by Congress,⁵² the American Bar Association (ABA) has helped foster each of these

sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.” 3 WILLIAM BLACKSTONE, COMMENTARIES *361.

47. See FLAMM, *supra* note 38, § 20.10, at 613-21; Marla N. Greenstein, *Judicial Disqualification in Alaska Courts*, 17 ALASKA L. REV. 53, 56 (2000).

48. America’s rules on judicial disqualification have, of course, evolved in manifold directions; we focus here on the three most fundamental substantive trends, spanning all United States jurisdictions. For more thorough histories of judicial disqualification in the United States, see FLAMM, *supra* note 38, at ch. 27 (summarizing state rules, with historical background interspersed); *id.* at ch. 23 (explaining the development of federal disqualification provisions); Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 537-50 (2005) (same); and Mark Andrew Grannis, Note, *Safeguarding the Litigant’s Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382, 387-96 (1987) (same). See also *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 849-50, 858-61 (1988) (examining the legislative intent behind 28 U.S.C. § 455, the primary federal disqualification statute).

49. See FLAMM, *supra* note 38, § 1.4, at 12; Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 573-74 (2004); Leubsdorf, *supra* note 42, at 246-47. See generally FLAMM, *supra* note 38, at chs. 23-27 (providing a detailed overview of disqualification rules in federal and state courts).

50. See M. Margaret McKeown, *Don’t Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J. APP. PRAC. & PROCESS 45, 45 (2005) (“In most [recusal] cases, the issue is not an actual conflict of interest or a claim of actual bias, but rather the appearance of potential bias in hearing a case where a judge’s impartiality is perceived to be in doubt.”); see also *Lavoie*, 475 U.S. at 825 (“The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice.” (internal quotations and citation omitted)); *Liteky v. United States*, 510 U.S. 540, 565 (1994) (Kennedy, J., concurring) (“[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done.”) (quoting Lord Hewitt’s maxim, ubiquitous in Commonwealth jurisprudence, from *Ex parte McCarthy*, [1924] 1 K.B. 256, 259 (1923)).

51. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 3E (2004); FED. JUDICIAL CTR., RECUSAL: ANALYSIS OF CASE LAW UNDER 28 U.S.C. §§ 455 & 144, at 15 (2002) (noting that every circuit has adopted a reasonable person standard for applying § 455, the federal statutory analogue to Canon 3E(1)).

52. See FLAMM, *supra* note 38, § 2.6.1-2, at 43-44 (noting that “[a]doption of the 1972 version of the [ABA Model] Code has since been accomplished, in whole or in part, in virtually every state as well as in the District of Columbia” and in all federal courts save the Supreme Court); Leslie W. Abramson, *The Judge’s Relative is Affiliated with Counsel of Record: The Ethical Dilemma*, 32 HOFSTRA L. REV. 1181, 1183 n.12 (2004) (asserting that “forty-nine states . . . have adopted some form of the ABA Code”).

trends. The centerpiece of modern United States disqualification law is the Model Code's Canon 3E, which stipulates that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."⁵³ As commentators have noted, Canon 3E's comprehensive concern for judicial impartiality "marks the curtailment, if not the demise" of the duty-to-sit doctrine.⁵⁴ "While a judge still may have a duty to sit in cases where he or she is not disqualified, there is an equally strong duty *not* to sit in cases where he or she is disqualified."⁵⁵

The expansion of judicial disqualification law has tracked the expansion in social understandings of the judicial role. Ever since the advent of Legal Realism, it has been untenable to see adjudication as "a mechanistic enterprise in which judges appl[y] the law and render[] decisions without recourse to their own ideological or policy preferences."⁵⁶ To the contrary, political scientists now routinely use attitudinal models to understand and predict judicial decision-making.⁵⁷ Legal Realism also sensitized the public to the policymaking power of courts—their ability to make law as well as apply it—and to the possibility that this power would increase in lockstep with the legalization of American life.⁵⁸

As society came to appreciate the enormous influence of judges

53. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1). Canon 3E(1)'s general standard, in particular, constitutes the core of modern disqualification law; per se rules vary significantly across jurisdictions and cover far less ground. See, e.g., FLAMM, *supra* note 38, § 2.6.5, at 50 (stating that "[t]he vast majority of judicial disqualification motions predicated on alleged Code violations have been based on [Canon 3E(1)'s general standard]"); Leubsdorf, *supra* note 42, at 240 (identifying Canon 3E(1)'s general standard as the most pro-litigant "axiom" of federal disqualification doctrine); Matthew D. Besser, Note, *May I Be Recused? The Tension Between Judicial Campaign Speech and Recusal After Republican Party of Minnesota v. White*, 64 OHIO ST. L.J. 1197, 1216 (2003) ("The modern view of judicial disqualification is exemplified by Canon 3E(1) . . .").

54. JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 4.02, at 109 (3d ed. 2000); accord Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 660-61 (1996).

55. SHAMAN ET AL., *supra* note 54, at 109.

56. VIRGINIA A. HETTINGER ET AL., JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING 30 (2006) (describing the dominant pre-Legal Realism view of judging).

57. In attitudinal models, judges are assumed to act in accordance with their personal preferences; liberal judges will vote for the liberal outcome, conservative judges will vote for the conservative outcome, and so forth. See, e.g., *id.* at 30-46 (explaining the basic attitudinal model and its primacy in the social science literature); LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 5-21 (2006) (summarizing standard models of judicial behavior and the evidence on their explanatory power).

58. Even the Supreme Court, which has a vested institutional interest in downplaying its policymaking discretion, see generally MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY (2004), has recently "recognized that judges do engage in policymaking at some level." *Chisom v. Roemer*, 501 U.S. 380, 399 n.27 (1991) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 466-67 (1991)); see also *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002) ("Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well.") (internal citation omitted). As John Leubsdorf has observed, the public's increased awareness "that judges do not simply resolve private disputes, but also shape and enforce governmental policy" has "give[n] litigants more reason to distrust even a judge with no stake in the result." Leubsdorf, *supra* note 42, at 250.

and the diversity of their motives (its view of judicial psychology shifting “from the eighteenth century’s economic man, susceptible only to the tug of financial interest, to today’s Freudian person, awash in a sea of conscious and unconscious motives”),⁵⁹ it became necessary to require disqualification for more than just pecuniary factors. As society grew less and less confident in the ideal of judicial impartiality, it became necessary to allow disqualification not only for actual bias, which is often very difficult to prove, but also for the appearance of bias, which may be the best proxy for actual bias and in any event may be equally damaging to the judiciary’s reputation. Objective standards were likewise needed to preserve public confidence and help steer judges away from self-interested or idiosyncratic recusal decisions.⁶⁰

Throughout American history, the great catalyst for disqualification reform has been scandal. The topic of disqualification, generally too technical, esoteric, and case-specific to attract widespread attention, comes onto the public radar when a prominent judge is attacked for improperly staying on a trial.⁶¹ Justice Scalia caused a major stir several years ago by refusing to recuse himself in *Cheney v. United States District Court*,⁶² despite his having gone duck-hunting with the petitioner Vice President several months before.⁶³ But it is the *White* ruling more than any other development that now has the potential to alter the nature and practice of judicial disqualification.

After *White*, all candidates for judicial office must be allowed to announce their views, and in at least some jurisdictions to commit to an adjudicative stance, on disputed legal and political issues. At the same time, there is enormous pressure for judicial campaigns to emulate other political campaigns in style and structure—with levels of television advertising, special interest involvement, and fundraising all rising precipi-

59. Leubsdorf, *supra* note 42, at 247.

60. Unsurprisingly, other common law countries have experienced a similar expansion in their disqualification regimes. Commentators report that virtually all such countries now apply objective standards and allow appearance of bias to be disqualifying. See Abimbola A. Olowofoyeku, *Regulating Supreme Court Recusals*, 2006 SING. J. LEGAL STUD. 60, 60-61, 69-78 (summarizing judicial disqualification principles in Commonwealth countries); R. Matthew Pearson, Note, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1814-28 (2005) (characterizing recusal policies in the courts of last resort of Australia, Canada, South Africa, and the United Kingdom).

61. See FLAMM, *supra* note 38, §§ 23.6.1, 28.3.2, at 678-80, 851-53 (describing Supreme Court recusal scandals); John P. Frank, *Conflict of Interest and U.S. Supreme Court Justices*, 18 AM. J. COMP. L. 744, 744 (1970) (“[S]hifts in the perception of conflicts of interest in general and disqualification in particular come partly by . . . what might be described as political or public opinion jerks or jumps from especially newsworthy episodes.”); Frost, *supra* note 48, at 533-34 (“With each new scandal or crisis has come a flurry of scholarship advocating an expansion of the grounds for disqualification, and Congress has often responded by amending the recusal laws as suggested.” (internal citation omitted)).

62. 542 U.S. 367 (2004).

63. See, e.g., Lori Ann Foertsch, Comment, *Scalia’s Duck Hunt Leads to Ruffled Feathers: How the U.S. Supreme Court and Other Federal Judiciaries Should Change Their Recusal Approach*, 43 HOUS. L. REV. 457, 458-59, 469-79 (2006) (explaining the controversy and providing citations to media and scholarly criticisms of Scalia’s decision).

tously since 2000.⁶⁴ As a result, judges will face more and more cases in which they have already suggested a preference for, if not a commitment to, a particular outcome, and in which they have received significant campaign contributions from one or more of the litigants.

Recognizing the threat these developments pose to judicial impartiality and due process, scholars have been furiously debating the proper relationship between judicial campaign activities and disqualification.⁶⁵ The ABA has revised its Model Code provisions.⁶⁶ Courts and legislatures may come next. "The topic du jour," one Ninth Circuit judge observed in a recent speech, "is recusal."⁶⁷

IV. THE LANDSCAPE OF AMERICAN DISQUALIFICATION LAW

To be able to evaluate reform options for judicial disqualification, one must first understand how this body of law currently operates; in this Part, we summarize its basic features. Disqualification law is somewhat difficult to characterize because, within a given state, constitutional provisions, statutes, court rules, judge-made doctrine, codes of judicial conduct (which may have the status of law or be merely hortatory), ethics board rulings, and administrative directives may all provide legal authority for removing a judge.⁶⁸ Constitutions provide a baseline of due

64. See generally GOLDBERG ET AL., *supra* note 32. For additional information on the rise in television advertising, see Brennan Center for Justice at NYU School of Law, Television Advertising About Judicial Selection, http://www.brennancenter.org/subpage.asp?key=38&init_key=9320 (last visited Feb. 6, 2007).

65. See, e.g., GASS, *supra* note 10, at 23-24 (discussing possible procedural and substantive reforms to strengthen recusal); Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 236-37 (2004) (urging state supreme courts and other responsible bodies to follow the Missouri Supreme Court and "consider shifting the enforcement of the pledge, promise, and commitment bans from sanctions for campaign statements that violate the canons to the requirement that judges recuse themselves from cases involving litigants or raising issues that were the subjects of a campaign pledge, promise, or commitment"); Friedland, *supra* note 49, at 632 (concluding that "carefully designed system[s] for judicial disqualification" can prevent elected judiciaries from having more serious due process problems than their appointed counterparts); Frost, *supra* note 48 (arguing that better procedures, not stricter substantive standards, are needed to invigorate disqualification law); Besser, *supra* note 53, at 1225-27 (recommending that the ABA clarify in the commentary to Canon 3E(1) that campaign statements permissible under the Code should be presumptively insufficient to require recusal); Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101 (2006) (explaining how *White* will make it more difficult for self-professed "tough-on-crime" judges to be disqualified in criminal trials and urging states to liberalize their recusal provisions as a corrective).

66. See ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORT (Nov. 2006), available at <http://www.abanet.org/judiciaethics/commissionreport.html> [hereinafter ABA REPORT]; see also Rachel Paine Caulfield, *In the Wake of White: How States are Responding to Republican Party of Minnesota v. White and How Judicial Elections Are Changing*, 38 AKRON L. REV. 625, 646 (2005) (describing the recommendations of the ABA's Standing Committee on Judicial Independence); McKeown, *supra* note 50, at 48 ("The [ABA] Commission [to Evaluate the Model Code of Judicial Conduct] is examining the disqualification standards in light of the increased attention and sensitivity about recusal.").

67. McKeown, *supra* note 50, at 45.

68. See FLAMM, *supra* note 38, at ch. 2 (describing the sources of disqualification law and their interrelationships). The ABA Model Code of Judicial Conduct and its state analogues can be seen as a form of ethics board ruling or administrative directive, albeit one that is far more comprehensive

process guarantees; the other sources give content to these guarantees and add grounds for disqualification.⁶⁹ Procedures and standards often differ among courts in the same state—so that, for example, it will be easier to disqualify a judge at the trial court level than at the appellate level⁷⁰—and they may also differ between civil and criminal trials,⁷¹ and between jury and bench trials.⁷²

The leading (indeed, the only) treatise on judicial disqualification concedes that “the theoretical underpinnings of American judicial disqualification jurisprudence remain murky and unsettled,” its precedents “replete with inconsistencies.”⁷³ Other prominent studies have found that “judicial disqualification frequently is subjective, random, and arbitrary,”⁷⁴ that it rests on “a set of cloudy distinctions.”⁷⁵ Functionally as well as conceptually, disqualification law is a sprawling patchwork, as

and significant than the others.

69. Constitutions, accordingly, provide a weak basis for disqualification. While the Supreme Court has held that the Due Process Clause requires “a fair trial in a fair tribunal,” *In re Murchison*, 349 U.S. 133, 136 (1955), in which the judge “hold[s] the balance nice, clear, and true,” *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), and that “justice must satisfy the appearance of justice,” *Offutt v. United States*, 348 U.S. 11, 14 (1954), the Court has also stated that “only in the most extreme of cases would disqualification on [the basis of the Due Process Clause] be constitutionally required.” *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 821 (1986); see also *id.* at 828 (“The Due Process Clause demarks only the outer boundaries of judicial disqualifications.”). “Congress and the states,” the Court hastened to add, “of course[] remain free to impose more rigorous standards for judicial disqualification than those [mandated by the Constitution],” *id.*, which is exactly what Congress and the states have done. Cf. FLAMM, *supra* note 38, § 2.3.3, at 33-38 (explaining “why disqualification is not usually ordered on due process grounds”); Friedland, *supra* note 49, at 577-604 (analyzing in detail when the Due Process Clause does and does not require disqualification for campaign statements); Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1083-99 (1996) (same, for the pre-*White*-era).

70. See FLAMM, *supra* note 38, § 28.2.1-2, at 845-47 (suggesting that procedures for bringing disqualification motions are often less favorable to movants at the appellate level). There is some logic to the practice of making it easier to disqualify trial court judges than to disqualify appellate judges. The former group hears many more cases, may be more likely to know the litigants and lawyers who appear in their court, and—because significantly more likely to have reached the bench via popular election, rather than merit selection, see PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 252 (1980)—may be less insulated from politics and better able to dispense patronage. It is by now a commonplace that “the potential for partiality and personality is greater” at the trial court level. *Id.* (quoting Kathleen L. Barber, *Selection of Ohio Appellate Judges: A Case Study in Invisible Politics*, in POLITICAL BEHAVIOR AND PUBLIC ISSUES IN OHIO 175, 185 (John J. Gargan & James G. Coke eds., 1972)).

Specialized courts (bankruptcy, family law, small claims, municipal, etc.) and quasi-judicial personnel (magistrates, special masters, mediators, arbitrators, etc.) may be subject to distinctive disqualification regimes, though the ABA Model Code is frequently applied to them as well. SHAMAN ET AL., *supra* note 54, § 4.02, at 111. Our focus in this article is on courts of general jurisdiction.

71. See FLAMM, *supra* note 38, §§ 1.5, 4.3, 28.6, at 13, 113, 876 (mentioning typical civil/criminal differentials); Note, *State Procedures for Disqualification of Judges for Bias and Prejudice*, 42 N.Y.U. L. REV. 484, 485 (same). Because concerns of due process are at their most compelling in criminal trials, a judge’s responsibility to recuse herself for actual or apparent bias may be heightened in the criminal context.

72. See FED. JUDICIAL CTR., *supra* note 51, at 59 (noting that some courts have indicated they will be more likely to grant recusal requests in bench trials because of the judge’s greater role); FLAMM, *supra* note 38, § 4.7, at 140 (same). Disqualification (and, when disqualification is initially denied, appellate relief) may also be easier to obtain in cases in which the judge sits alone, rather than on a panel. *Id.* § 2.6.3, at 46.

73. FLAMM, *supra* note 38, § 1.6, at 14.

74. JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 4-5 (1995).

75. Leubsdorf, *supra* note 42, at 238 (discussing the federal disqualification regime).

thin as it is wide.

A. Universal Features

There are some important features of disqualification law, however, that are largely consistent across United States jurisdictions. Perhaps the most basic commonality is supplied by the ABA's Canon 3E(1): "[A] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."⁷⁶ That general standard has been incorporated into federal law⁷⁷ and the judicial conduct codes of forty-seven states,⁷⁸ and it offers the most expansive ground for disqualification everywhere it appears. Most of Canon 3E's specific rules on disqualification also apply nationwide: a judge should always recuse herself (or be disqualified) when she is biased against one of the parties,⁷⁹ previously served as a lawyer in the matter in controversy,⁸⁰ has an economic interest in the subject matter of greater than de minimis value,⁸¹ is related to a party or lawyer in the proceeding within the third degree of kinship,⁸² has personal knowledge of disputed evidentiary facts,⁸³ or has made improper ex parte commu-

76. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (2004); *see supra* notes 53-55 and accompanying text (explaining this provision's central role in modern disqualification law).

77. 28 U.S.C. § 455(a) (2000).

78. The three states whose codes of judicial conduct lack this clause are Michigan, Montana, and Texas. We do not count Wisconsin, whose code, incorporated in full into its Supreme Court rules, stipulates that "a judge shall recuse himself or herself in a proceeding . . . when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial." WIS. SUP. CT. R. ch. 60.04(4). Wisconsin thus explicitly appeals to a reasonable person who is "knowledgeable" and "well-informed," but the substance of the standard is the same.

Among the forty-seven states (and the District of Columbia) with codes of judicial conduct that include this clause, some follow the original ABA Model Code in using "should disqualify" instead of "shall disqualify." *See* Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 543 n.3 (1994) (discussing the ABA's decision to replace "should" with "shall" in 1990); Abramson, *supra* note 52, at 1183-84 n.12 (listing sixteen states using "should" as of 2004). Yet even where state codes use "should," most courts have interpreted the provision to have a mandatory effect. SHAMAN ET AL., *supra* note 54, § 4.02, at 110-11.

In Michigan, Montana, and Texas, moreover, Canon 3E(1) may still offer a basis for disqualification. A January 2006 ruling by the Michigan Supreme Court featured one Justice proposing a new court rule that would incorporate this Canon, *Adair v. State*, 709 N.W.2d 567, 581-82 (Mich. 2006) (statement of Cavanagh, J.), while another justice forcefully protested the majority's failure to apply it, *id.* at 584 (statement of Weaver, J.). A dissent from a 1990 Montana Supreme Court ruling suggested that Canon 3E(1) may require disqualification of a judge "[u]nder appropriate circumstances." *Washington v. Mont. Mining Props., Inc.*, 795 P.2d 460, 466 (Mont. 1990) (Sheehy, J., dissenting). The argument for Texas is more straightforward: its rules of civil procedure expressly incorporate Canon 3E(1). *See* TEX. R. CIV. P. 18b(2)(a); *see also* TEXAS CODE OF JUDICIAL CONDUCT Canon 5 cmt. (2002) ("A statement made during a campaign for a judicial office, whether or not prohibited by this Canon, may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal.").

79. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(a).

80. *Id.* Canon 3E(1)(b).

81. *Id.* Canon 3E(1)(c).

82. *Id.* Canon 3E(1)(d).

83. *See generally* FLAMM, *supra* note 38, at ch. 12. *See also id.* § 12.1, at 335 & n.8 (noting that courts have interpreted Canon 3E's general standard as prescribing disqualification when the judge

nications during the course of the proceeding.⁸⁴ These per se rules are largely commonsensical and, except at the margins, uncontroversial.

Certain disqualification doctrines are similarly universal. The “rule of necessity”—when no impartial judge is available, the original judge(s) assigned to the case may take it—always trumps.⁸⁵ Blanket and class-based disqualification challenges are disfavored.⁸⁶ It is more difficult to disqualify a judge for bias against an attorney than for bias against a party.⁸⁷ To be disqualifying, the actual or apparent bias of the judge must be directly relevant to the proceeding at issue,⁸⁸ and the “bias must be personal, as opposed to judicial, in nature.”⁸⁹ The latter distinction is often analyzed under the “extrajudicial source rule,” which holds that unless it is so pervasive or egregious as to “display a deep-seated favoritism or antagonism that would make fair judgment impossible,” bias that stems directly from the case proceedings will not be disqualifying.⁹⁰

In all (for-cause) disqualification motions, the evidentiary and persuasive burdens rest with the movant; judicial bias, partiality, and interest are never presumed.⁹¹ These burdens are heavy—to prevail, the movant “ordinarily must adduce facts that would raise significant doubt as to whether justice would be done in the case.”⁹² On appeal, odds of

“has personal knowledge of disputed evidentiary facts”).

84. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7); FLAMM, *supra* note 38, at ch. 14.

85. The rule of necessity is absolute when it applies, and “can be justified only by strict and imperious necessity.” Annotation, *Necessity as Justifying Action by Judicial or Administrative Officer Otherwise Disqualified To Act in Particular Case*, 39 A.L.R. 1476, 1479 (1925). It has been in use since at least 1430. See *United States v. Will*, 449 U.S. 200, 213 (1980).

86. These are challenges that seek to remove a judge from hearing all cases of a certain type. An example of a blanket disqualification challenge would be an attorney’s request that a judge be disqualified from hearing all cases brought by her firm or a public defender’s request that a judge be disqualified from hearing all capital cases. An example of a class-based challenge would be a motion to remove a judge for her racism. Both types of challenges violate the case-by-case method and the “strong presumption that those who sit in a judicial capacity are disinterested, impartial, and unbiased in all matters that come before them,” FLAMM, *supra* note 38, § 19.9, at 573-74 (internal citations omitted), and so are rarely upheld. See *id.* § 3.5.3, at 66-72 (summarizing blanket challenges); *id.* § 4.5, at 126-29 (summarizing claims of class bias); SHAMAN ET AL., *supra* note 54, § 4.08, at 125 (noting that “courts are highly reluctant to grant blanket disqualification” and providing examples).

87. See FLAMM, *supra* note 38, § 4.4, at 114-26; SHAMAN ET AL., *supra* note 54, § 4.08, at 122-24.

88. See FLAMM, *supra* note 38, § 4.6.1, at 132.

89. See *id.* §§ 4.3, 4.6.1, at 112, 131 (citations omitted); SHAMAN ET AL., *supra* note 54, § 4.04, at 113.

90. *Liteky v. United States*, 510 U.S. 540, 555 (1994); see also *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (applying the extrajudicial source rule); FLAMM, *supra* note 38, § 4.6, at 129-40 (explaining the rule); SHAMAN ET AL., *supra* note 54, § 4.05, at 115-17 (same). There is some debate over the coherence and manageability of this doctrine—critics point out the difficulties in determining what is extrajudicial versus intrajudicial and ask why this distinction should be so decisive—but it remains good law.

91. FLAMM, *supra* note 38, § 19.9, at 573; Leubsdorf, *supra* note 42, at 241-42.

92. FLAMM, *supra* note 38, § 19.9, at 575-76. Different courts have defined the evidentiary burden in different ways—demanding, for example, a showing of “compelling evidence, substantial evidence, or a preponderance of the evidence.” *Id.* § 19.9, at 576-77. In some jurisdictions, a judge must take as true the facts alleged in support of a disqualification motion, whereas in others judges may be permitted, or may even have the duty, to assess the validity of these facts. *Id.* § 19.3.1, at 559-62. Jurisdictions also differ as to whether the actions of a disqualified judge are void or merely voidable. *Id.* § 22.4.2, at 653-55. All of these distinctions, however, are minor compared to the uniformity in the allocation (to the movant) and degree (onerous) of the burden of proof.

success are even worse. Nearly every appellate court, state and federal, will overturn a lower court's disqualification or recusal decision only for an "abuse of discretion."⁹³

More directly relevant to the *White* ruling, it is extremely difficult to disqualify a judge either for having received a campaign contribution from one of the parties or their lawyers, or for having previously expressed a position on a legal or political issue implicated by the case. Since 1999, the ABA has included in Canon 3E a provision prescribing disqualification of an elected judge when:

the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [***] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than [[\$***] for an individual or [\$***] for an entity]]] [[is reasonable and appropriate for an individual or an entity]].⁹⁴

Yet in the subsequent years, no states have adopted this provision. One state (Alabama) had a similar policy in place at the time of the ABA's revision,⁹⁵ but it appears to be rarely applied.⁹⁶ The ABA position is

93. See FLAMM, *supra* note 38, § 32.1, at 999-1000 ("This 'abuse of discretion' standard is generally employed both by state appellate courts and by the various federal circuit courts of appeal, and it is typically applied in both civil and criminal proceedings." (citations omitted)); FED. JUDICIAL CTR., *supra* note 51, at 65 (claiming that an abuse of discretion standard is used in every federal circuit except for the Seventh, which reviews disqualification appeals de novo); see also FLAMM, *supra* note 38, § 1.10.1, at 20 (asserting that appellate courts "tend to view judicial disqualification inquiries as both difficult and distasteful" (citations omitted)); *id.* §§ 31.4-7, at 975-91 (summarizing the procedural mechanisms for appealing a disqualification decision and noting that state and federal courts rarely grant such appeals, whether made through interlocutory order, motion for reconsideration, or post-trial petition); PATRICK M. MCFADDEN, AM. JUDICATURE SOC'Y, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 19-20 (1990) (highlighting the deferential nature of appellate review regarding recusal). The abuse of discretion standard is typical of appellate review of conclusions of fact in the American legal system, whereas conclusions of law are generally reviewed de novo. (The scrutiny applied to mixed findings of fact and law will depend on the issue at question.) See Lisa M. White, Comment, *A Wrong Turn on the Road to Tort Reform: The Supreme Court's Adoption of De Novo Review in Cooper Industries v. Leatherman Tool Group, Inc.*, 68 BROOK. L. REV. 885, 904 (2003).

94. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(e) (2004) (brackets in original). "Aggregate contributions" are meant to include both direct and indirect gifts made to a candidate. *Id.* at Terminology. In its suggested revisions to the Model Code, an ABA commission recently recommended adding "or the law firm of a party's lawyer" to the phrase "a party [or a] party's lawyer." ABA REPORT, *supra* note 66, Rule 2.11(A)(4).

95. ALA. CODE § 12-24-2(c) (Replacement 2005); *cf.* Petition for a Writ of Certiorari at 23-24, *Jones v. Burnside*, 127 S. Ct. 576 (2006) (No. 06-53) (identifying Alabama as the only state with a similar provision to the ABA's Canon 3E(1)(e)); Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S.C. L. REV. 667, 675 & n.28 (2001) (identifying Alabama as the only state that clearly requires elected judges to recuse or be disqualified when faced with major contributors and arguing that disqualification in these instances should be automatic). Mississippi has added a provision to its Code of Judicial Conduct indicating that "[a] party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for that party is a major donor to the election campaign of such judge" and stipulating that such motions will be evaluated like any other recusal motion. MISS. CODE OF JUDICIAL CONDUCT Canon 3E(2) (2002). As if to clarify how dramatically this provision falls short of the ABA's Canon 3E(1)(e), the official commentary notes that "[t]his provision does not appear in the ABA Model Code of Judicial Conduct." *Id.* Canon 3E(2) cmt.

96. See Val Walton, *Suit Claims Governor, AG Not Enforcing Campaign Law*, BIRMINGHAM NEWS, Aug. 2, 2006, at 2B; see also *Finley v. Patterson*, 705 So. 2d 834, 835 n.1 (Ala. 1997) (Cook, J., concurring) (describing the enforcement of section 12-24-2 of the Alabama Code as being "in legal limbo" because it was not precleared under the Voting Rights Act); *Brackin v. Trimmer Law Firm*, 897 So. 2d 207, 230-34 (Ala. 2004) (Brown, J., statement of nonrecusal) (stating, "I am not aware of

not just ignored; it is inverted in the prevailing jurisprudence, in which motions to disqualify a judge for campaign contributions “hardly ever succeed.”⁹⁷ Motions to disqualify because a party or attorney has provided other types of campaign support, such as public endorsement or participation on the judge’s campaign staff, have met a similar fate.⁹⁸ Motions to disqualify for *failure* to contribute money, time, or support to a judge’s election campaign have fared even worse.⁹⁹

The *White* decision may be expected to increase not only the volume of judicial campaign contributions, but also the volume of judicial campaign speech expressing a position on disputed issues likely to come before the court. As Commitment Clauses and Pledges or Promises Clauses are rescinded or invalidated, judicial campaign *promises* will be “unavoidable” as well.¹⁰⁰ Yet on account of the “strong presumption against disqualifying a judge” for her views on law or policy,¹⁰¹ recusal will rarely be required because of something the judge has said. Except when they have expressed a clear, prejudicial view on a particular party appearing before the court or the merits of a particular case, judges will normally have no obligation to recuse for statements they have made on the campaign trail.¹⁰²

any opinions in which this Court has resolved the issue of the enforceability of §§ 12-24-1 and -2,” and refusing to recuse despite contributions of more than \$50,000 from an *amicus curiae* PAC affiliated with one of the parties).

97. John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 87 (2003) (citing numerous examples); accord FLAMM, *supra* note 38, § 6.4.1, at 184-85; see also Brief of Amicus Curiae Public Citizen in Support of Reversal at 1, *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (No. 01-521) (describing Public Citizen’s unsuccessful challenge to Texas’s system, “which allows large campaign contributions by lawyers and others with interests before the courts but does not require recusal of judges when contributors appear before them”). Professor Nagle notes that academia has sided squarely with the ABA on this issue: “Indeed, the scholarly opinion is just as unanimous that a campaign contribution should require a judge to recuse as the courts are agreed that recusal is unnecessary.” Nagle, *supra*, at 88 (providing citations to scholarly critiques).

Courts have been more sympathetic to disqualification motions when the campaign contribution at issue is particularly large, particularly close in time to the proceeding, or supplemented by additional campaign activity. See, e.g., *Pierce v. Pierce*, 39 P.3d 791, 798 (Okla. 2001) (indicating that the size, timing, and manner of judicial campaign contributions may be relevant to the disqualification determination); *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1338 n.5 (Fla. 1990) (“Although a motion for disqualification based *solely* upon a legal campaign contribution is not legally sufficient, it may well be that such a contribution, in conjunction with some additional factor, would constitute legally sufficient grounds for disqualification upon motion.”).

98. See FLAMM, *supra* note 38, § 6.4.3, at 191-94.

99. See *id.* § 6.5, at 194-96. Some courts have denied disqualification when the moving party or her counsel did “not merely provide political support to the judge’s opponent,” but in fact *was* the opponent. *Id.* § 6.5, at 195-96.

100. Friedland, *supra* note 49, at 620.

101. See FLAMM, *supra* note 38, § 10.2, at 293-94; *id.* § 10.4, at 296-97 (“[I]t has generally been agreed that, for a judge’s prejudgment to warrant disqualification, it must go directly to his personal appraisal of a party appearing before him or to the merits of a particular case, and must result in the judge’s mind becoming ‘irrevocably closed’ on the issues as they arise in the context of a specific case.” (citations omitted)). See generally *id.* §§ 10.1-.7, at 290-303 (synopsizing the disqualification rules for judges’ remarks on legal and political matters).

102. Recognizing as much, an ABA commission recently recommended an addition to the Model Code prescribing disqualification when:

The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision or opinion, that commits or appears to commit the

B. Differential Features

Other features of judicial disqualification law vary substantially across United States jurisdictions. The most meaningful distinction is that in about one-third of the states, litigants may disqualify a judge without showing cause.¹⁰³ This is known as peremptory disqualification.¹⁰⁴ It harks back to the Code of Justinian and its policy of allowing parties to “recuse” judges they deemed “under suspicion.”¹⁰⁵ When peremptory challenges are denied for a procedural deficiency or are no longer available—such challenges are usually capped at one per proceeding¹⁰⁶—litigants retain the right to seek recusal or disqualification for cause.

Among for-cause jurisdictions (and in peremptory jurisdictions when challenges are made for cause), the crucial distinctions tend to be procedural, not substantive. While jurisdictions differ as to the specific situations calling for disqualification and the specific requirements for a successful motion, the standards and doctrines that courts apply tend to be functionally the same.¹⁰⁷ More notable, and probably more consequential, are differences in the methods courts use for handling a recusal or disqualification motion—a topic on which the Model Code is silent. Some courts require the challenged judge to transfer these motions immediately to a colleague (a presiding judge or chief judge chooses which

judge to reach a particular result or rule in a particular way in the proceeding or controversy.

ABA REPORT, *supra* note 66, Rule 2.11(A)(5).

103. See FLAMM, *supra* note 38, § 3.1, at 59 (stating that “a substantial minority of states[,] most . . . either midwestern or western,” have adopted peremptory rules); Friedland, *supra* note 49, at 615 (“About a third of the states already provide for . . . peremptory disqualification.”); Leubsdorf, *supra* note 42, at 240 n.13 (reporting that, as of 1987, seventeen states had statutory provisions allowing peremptory disqualification). See generally FLAMM, *supra* note 38, at ch. 3 (providing an overview of peremptory disqualification). For an example of a representative peremptory statute, see ALASKA STAT. 22.20.022(a) (2005) (“If a party or a party’s attorney in a district court action or a superior court action, civil or criminal, files an affidavit alleging under oath the belief that a fair and impartial trial cannot be obtained, the presiding district court or superior court judge, respectively, shall at once, and without requiring proof, assign the action to another judge of the appropriate court in that district, or if there is none, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. The affidavit must contain a statement that it is made in good faith and not for the purpose of delay.”).

At the federal level, 28 U.S.C. § 144 appears to dictate peremptory disqualification for charges of personal bias or prejudice in district courts, but the Supreme Court has interpreted § 144 so as to require “fair support” for all such charges, *Berger v. United States*, 255 U.S. 22, 33 (1921), and disqualification has rarely been sought or obtained under this statute. FLAMM, *supra* note 38, § 25.8, at 737-38; CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3541, at 551 (2d ed. 1984). Critics have assailed the Court’s interpretation of § 144 as subverting a clear congressional intent to allow peremptory disqualification. See, e.g., Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1224 (2002); Frank, *supra* note 45, at 629; Frost, *supra* note 48, at 543-44.

104. Peremptory disqualification, it should be noted, may be implemented any number of ways. Among jurisdictions that offer it, there are significant disparities regarding whether and what kind of affidavit must be filed, the strictness or liberality with which judges will interpret the controlling statutes, and the rules on timeliness, waiver, and review. See FLAMM, *supra* note 38, §§ 3.7-.17, at 74-102.

105. See *supra* notes 43-44 and accompanying text.

106. FLAMM, *supra* note 38, § 3.9.2, at 80-81.

107. See *supra* Part IV.A; *supra* notes 48-60 and accompanying text.

colleague);¹⁰⁸ some require transfer only after the challenged judge has ensured the motion's timeliness and sufficiency; the rest let the challenged judge decide on these motions herself.¹⁰⁹ Most state and federal courts, including the Supreme Court,¹¹⁰ follow the latter policy and rarely, if ever, require transfer.¹¹¹ Nor is voluntary transfer typical.¹¹² Likewise, while some jurisdictions encourage or require challenged judges to hold evidentiary hearings, most leave the decision of whether to do so entirely to the judge's discretion.¹¹³ With or without hearings, judges in most—though again, not all—jurisdictions do not need to give a reasoned explanation for their recusal decisions.¹¹⁴ In practice, judges have been much more likely to give reasons when they decline to recuse themselves.¹¹⁵

Another important distinction, discussed in Part II above, is external to disqualification law: how jurisdictions select their judges and regulate their behavior outside the courtroom. Among the states with elected judiciaries, campaign practices vary along a host of dimensions, from fundraising and spending regulations,¹¹⁶ to speech restrictions (though these may be converging on account of *White*), to levels of spe-

108. See, e.g., ALASKA STAT. § 22.20.020(a)(9); UTAH R. CIV. P. 63(b)(2)-(3) (2005); VT. R. CIV. P. 40(e)(3) (2006).

109. See Abramson, *supra* note 78, at 545-58 (explaining these three methods and their subvariants).

110. Judicial disqualification raises particularly vexing issues at the Supreme Court level, where there is no possibility of review by a higher court or (under current law) substitution of justices, and where the removal of a justice creates the possibility of an equally divided Court. Many have criticized the federal Supreme Court's laissez-faire recusal policies. See, e.g., Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657 (2005); Olowofoyeku, *supra* note 60; Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107 (2004); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589 (1987); Foertsch, *supra* note 63; Timothy J. Goodson, Comment, *Duck Duck Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of Cheney v. United States District Court*, 84 N.C. L. REV. 181 (2005); Pearson, *supra* note 60; Christopher Riffle, Note, *Ducking Recusal: Justice Scalia's Refusal To Recuse Himself from Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (2004), and the Need for a Unique Recusal Standard for Supreme Court Justices, 84 NEB. L. REV. 650 (2005). Because the Supreme Court's disqualification practices raise such discrete concerns and are already scrutinized by the media and the legal community at great depth, we focus in this article only on lower courts.

111. On the rarity of transfers in federal courts, see Schurz Communications, Inc. v. FCC, 982 F.2d 1057, 1059 (7th Cir. 1992); FED. JUDICIAL CTR., *supra* note 51, at 44; Frost, *supra* note 48, at 571-72; Randall J. Litteneker, Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 266 (1978). On the rarity of transfers in state courts, see FLAMM, *supra* note 38, § 17.5.1, at 516-17; Abramson, *supra* note 78, at 547 (counting twenty-seven states as of 1994 that rest recusal decisions "within the sound discretion of the challenged judge").

112. See FLAMM, *supra* note 38, § 17.5.1, at 516-17; Frost, *supra* note 48, at 571-72.

113. See FLAMM, *supra* note 38, § 17.6, at 523-35; Abramson, *supra* note 78, at 555-58; Frost, *supra* note 48, at 569-70.

114. See MCFADDEN, *supra* note 93, at 19; Frost, *supra* note 48, at 569-70; Leubsdorf, *supra* note 42, at 244-45.

115. See Frost, *supra* note 48, at 570-71; Leubsdorf, *supra* note 42, at 244-45 ("Published opinions . . . form an accumulating mound of reasons and precedents against withdrawal; meanwhile, some judges routinely and silently disqualify themselves in comparable cases.").

116. See generally ANTHONY CORRADO ET AL., THE NEW CAMPAIGN FINANCE SOURCEBOOK (2d ed. 2005); BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, WRITING REFORM: A GUIDE TO DRAFTING STATE & LOCAL CAMPAIGN FINANCE LAWS (Deborah Goldberg ed., rev. ed. 2004).

cial interest involvement, advertising, and partisan rancor. Thus, even though two states may have disqualification regimes that look quite similar on the books, in application one state's courts might face systematically different—and more troubling—issues on account of its judicial elections and the financial and political pressures they entail.

C. *The Current State of Judicial Recusal: Underuse and Underenforcement*

Unfortunately, there appear to be no systematic empirical studies on the success rates of disqualification motions or the circumstances in which recusal occurs. Such research is stymied by the lack of a written record on most recusal decisions. But there are several reasons to believe that disqualification provisions are systematically underused and underenforced.

First, motions for disqualification are likely to be underused by parties because they are costly and risky. Paying clients may not wish to incur the additional litigation costs of filing the motion, especially if the prospects for success appear low. As a rule, the heavy evidentiary and persuasive burdens demanded of movants will generate steep odds against disqualification at the trial level, and steeper odds on review.¹¹⁷ And the fear of angering the judge with an unsuccessful motion—which may apply especially to lawyers who are likely to appear before the judge in other cases—may deter the filing from the start.¹¹⁸

Second, several of the current doctrines concerning recusal make it likely that disqualification provisions are underenforced. Allowing judges to decide challenges to their own impartiality is not a policy calculated to promote vigorous enforcement.¹¹⁹ Transferring the motion to

117. See *supra* notes 91-93 and accompanying text; see also Shepard, *supra* note 69, at 1080 (observing that “even a casual perusal of the cases decided under the federal statute”—which is similar in substance to many state statutes— “demonstrates that only the very most outrageous behavior is sufficient to win a recusal”).

118. See ALAN J. CHASET, DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGE 58 (1981) (noting that “[j]udges, like other persons, are likely to resent charges of bias”); Howard J. Bashman, *Recusal on Appeal: An Appellate Advocate's Perspective*, 7 J. APP. PRAC. & PROCESS 59, 68 (2005) (“[An] unsuccessful[] recusal request could cause the appellate judge to harbor resentment toward the party which claimed that the appellate judge was incapable of being fair. After all, judges are only human. And therefore, a recusal request that unsuccessfully challenges the perception of a judge's impartiality can serve as a self-fulfilling prophesy.”); *id.* at 74 (“[A] party should move to disqualify an appellate judge only when disqualification is guaranteed to result. This is because the only thing worse than an appellate judge whose impartiality might reasonably be questioned is an appellate court that might well resent a party's attempt, without a convincing basis, to disqualify a judge from ruling on the merits of a case.”); Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606, 622 (2002) (“Although recusal motions are filed against Justices on the Court, most litigants do not seek disqualification . . . because to do so suggests a lack of confidence in a Justice's ability to evaluate the issues objectively.”); Stephen L. Wasby, *Recusal of Federal Judges: A Discussion of Recent Cases*, 14 JUST. SYS. J. 525, 530-31 (1991) (discussing the risks of judicial “retribution” following a denied recusal motion).

119. Beyond the obvious sense in which this practice might seem to contravene the maxim that “no man shall be a judge in his own case,” see *supra* note 46 and accompanying text, R. Matthew

friendly colleagues on the same court, while an improvement over deciding one's own case, may not substantially improve the situation. Moreover, the fact that judges generally are required neither to hold hearings on the claim nor to give reasons for their decisions makes it easy for them to reject meritorious disqualification motions with impunity.

Third, research on social psychology shows that much bias is unconscious and that people tend to underestimate and undercorrect for their own biases and conflicts of interest.¹²⁰ Thus, even a judge trying conscientiously to decide a motion for her recusal may be unable to appreciate biases apparent to more objective observers. Given current levels of homogeneity in the judiciary, it might also be the case that appellate judges will share certain unexamined biases that will impair their ability to operate as a corrective.

V. INVIGORATING JUDICIAL DISQUALIFICATION: TEN POTENTIAL REFORMS

Having outlined the growing threats to judicial independence and impartiality—and the inadequacy of judicial disqualification, as currently utilized, to combat these threats—we consider in this Part some possible solutions. It would be impractical (not to mention tedious) to evaluate in detail the merits of every option, so here we offer ten proposals with the potential to invigorate dramatically the protections offered by disqualification. Section A suggests nine possible reforms to systems of disqualification that courts could implement unilaterally—what we will call *internal* solutions. Section B suggests one reform that citizens might undertake even without the imprimatur of the courts—what we will call an *external* solution. We make no claim to the originality of our list, but it offers an array of recusal reform options for courts interested in preserving their independence by embracing greater accountability.

Pearson notes that “asking a challenged Justice to rule on a motion to recuse puts that Justice in a precarious position. . . . [B]ecause a Justice is expected to recuse himself *sua sponte* if there is a reasonable apprehension of bias, a successful motion to recuse requires the Justice to admit that he failed in the first instance to adhere to statutory and ethical requirements.” Pearson, *supra* note 60, at 1833-34.

One empirical study of 571 state court judges in Arkansas, Nebraska, New Hampshire, and Ohio regarding their disposition to disqualify themselves under a range of circumstances seemed to suggest a general judicial hostility toward recusal. Almost three-fourths of the respondents indicated a high level of ambivalence about disqualification across all of the questions raising the issue. SHAMAN & GOLDSCHMIDT, *supra* note 74.

120. See, e.g., Dolly Hugh et al., *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest*, in CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 74 (Don A. Moore et al. eds., 2005); Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCH. REV. 781 (2004). Professor Debra Lyn Bassett has probed the relevance of these findings for judicial disqualification in Bassett, Bassett, *supra* note 103, at 1248-51; Bassett, *supra* note 110, at 661-71.

As a preliminary matter, we recognize that all of these proposals require tradeoffs among the benefits and risks they present. On the one hand, strengthening disqualification rules may be a means to safeguard due process and public trust in the judiciary.¹²¹ On the other hand, strengthening these rules may increase administrative burdens and litigation delays, open new avenues for strategic behavior (such as judge shopping), and undermine a judge's duty to hear all cases. These tradeoffs demand that any solution be carefully designed and implemented, and we do not mean to minimize that task by providing only a cursory sketch of each reform option. But the looming crisis created by *White* and exacerbated by *Avery* means that reform is no longer an option; it is a necessity.

A. *Nine Internal Solutions*

Invigorating recusal standards in any particular jurisdiction is unlikely to require acceptance of all of the proposals we describe. Indeed, some of the procedures we recommend are already in place in some states.¹²² Implementing certain suggestions would obviate the need for others. The value of each reform will depend upon the context into which it is introduced.

1. Peremptory Disqualification

Just as the parties on both sides of criminal trials are permitted to strike a certain number of people from their jury pool without showing cause, so might litigants be allowed peremptory challenges of judges. About a third of the states already permit counsel to strike one judge per proceeding.¹²³ Peremptory disqualification has the potential to increase substantially the frequency of disqualification, and it denies judges the opportunity to defend themselves against charges of partiality. Its great advantage, though, lies in its simplicity: by granting litigants one "free pass," peremptory disqualification allows most of them to secure an unbiased judge without the expense, unseemliness, and retribution risk of a disqualification challenge. If the next-assigned judge is

121. Sometimes one hears the argument that disqualification rules concerned with minimizing the appearance of bias will have the perverse effect of distracting attention from more pressing issues of actual bias, of elevating appearance over reality. See, e.g., Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095 (2004). This line of argument, in our view, slights the instrumental value of avoiding the appearance of bias both for preserving public confidence in the judiciary (and in public institutions more generally) and, more basically, for rooting out actual bias that would otherwise be undetectable.

122. Systematic comparative research into the usage and efficacy of the various policies already in place is sadly lacking.

123. See *supra* notes 103-106 and accompanying text (describing peremptory disqualification). There is also a federal peremptory disqualification statute, 28 U.S.C. § 144, but the Supreme Court has vitiated its significance by requiring "fair support" for all motions brought under it. See *supra* note 103.

also unsatisfactory, the litigant may challenge her for cause.

Opponents of peremptory disqualification have typically raised two main arguments against it: that it will lead to “abuses”—instances in which the litigant exercises a peremptory strike not out of sincere due process concerns but rather because the assigned judge seems unfavorable—and that it will burden judicial administration.¹²⁴ Abuse is always a risk, but the criticism applies equally to peremptory challenges of venirepersons, which we nevertheless use to promote confidence in the jury’s fairness. Jurisdictions may be able to deter peremptory challenges of judges for truly ungrounded or offensive reasons by requiring an affidavit explaining the challenge.¹²⁵

Some amount of administrative disruption is likewise inevitable. But by capping peremptory challenges at one per proceeding and requiring them to be made at an early stage (before the removed judge has invested time and energy familiarizing herself with the case), disruption can be kept to a minimum. Against these costs, the great appeal of peremptory disqualification is that of all the plausible reforms it provides the most straightforward, robust protection of judicial impartiality.

2. Enhanced Disclosure

In the wake of the *White* decision, enhanced disclosure might be one of the simplest and most important reforms available. Judicial candidates now are more likely to make campaign statements on controversial legal and policy questions. Some of those statements—particularly when they reflect express or implied promises about how the judge will decide certain classes of cases—might support reasonable doubts about the judge’s impartiality. Judges could be required to file with their clerk’s office copies or transcripts of all campaign advertising and statements, which the court could then make available for public inspection by parties in a case. Without such disclosure requirements, the burdens of tracking down such information may be prohibitive for many litigants.

Similarly, judges could be required to disclose information about their campaign finances. Although campaign finance laws in every state now mandate reporting of campaign contributions and expenditures,¹²⁶ the stringency and enforcement of disclosure provisions vary widely.

124. See Bassett, *supra* note 103, at 1254.

125. See FLAMM, *supra* note 38, § 3.8, at 76-79 (describing peremptory disqualification jurisdictions that require the filing of a timely motion, a supportive affidavit, and a certification of good faith in order for disqualification to be granted).

126. See Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 471 (1988) (“All fifty states and the District of Columbia require candidates for elective office to file reports disclosing all campaign contributions and, for contributions over a certain amount, the names of contributors.”).

Even when disclosure rules are sound, moreover, information about a particular judge may be difficult to obtain. In states with canons proscribing the direct solicitation of contributions by judicial candidates, the court clerk's office might be asked to provide the parties with campaign finance reports, so that these disclosures do not vitiate efforts by conscientious judges to insulate themselves from the potentially distorting influence of that information.

More generally, judges could be required to disclose orally or in writing, at the outset of the litigation, any facts that might plausibly be construed as bearing on the judges' impartiality. Such a mandatory disclosure scheme would shift some of the costs of disqualification-related fact finding from the litigant to the state. It would also increase the reputational and professional cost to judges who fail to disclose pertinent information that later emerges through another source.

Objections to this proposal might emphasize the added burden on judges or clerks, the potential intrusiveness on judges' privacy, and the low probability that judges would disclose many of the most relevant facts. (For example, no one will say, "I am a racist" or "I feel beholden to the trial lawyers who supported my campaign.") The practical burden on judges is small, however, and the marginal cost to their privacy is slighter still, because judges already have an ethical obligation to disclose pertinent facts, even if this obligation has not been formalized into a legal rule.¹²⁷ While it may be true that no disclosure policy could force judges to disclose their biases and interests when they are unwilling to do so (or are ignorant of their existence), this weakness is not an argument *against* enhanced disclosure; it just indicates that enhanced disclosure is a partial solution. Disclosure is also an incomplete solution in the sense that it provides only the grounds for disqualification; it does not guarantee that a judge will recuse herself when the grounds are made known.

3. Per Se Rules for Campaign Contributors

To address the concern about judges who decline to recuse themselves when their campaign finances reasonably call into question their impartiality, the ABA has recommended mandatory disqualification of any judge who has accepted large contributions from a party appearing

127. Judges do have a general ethical obligation to disclose possible grounds for their disqualification. See FLAMM, *supra* note 38, § 19.10.2, at 579. The ABA Model Code stipulates that "[a] judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." MODEL CODE OF JUDICIAL CONDUCT, Canon 3E(1), Commentary (2004). Notice, however, that this stipulation appears only in the Commentary and is phrased in hortatory, not mandatory terms. Legally, litigants "cannot require an unwilling judge to disclose facts and opinions." Leubsdorf, *supra* note 42, at 242.

before her. As we explained above, current recusal doctrine makes it extremely difficult to disqualify a judge for having received contributions from a litigant or her lawyer,¹²⁸ even though we have ample evidence to suggest that these contributions create not only the appearance of bias but also actual bias in judicial decision-making.¹²⁹ This problem is only going to grow more acute in the coming years, as judicial election campaigns become increasingly expensive.

The ABA's solution is a per se rule for campaign contributors: disqualification shall be required whenever a party, a party's lawyer, or a party's lawyer's law firm has given the judge aggregate contributions above a certain amount, within a certain time period.¹³⁰ By setting a maximum threshold, the ABA's per se rule eliminates lawyers' incentive to curry favor through large contributions. By allowing contributions below that threshold, the ABA rule respects the fact that in many races the local bar will be in the best position to evaluate the candidates' merits—and if lawyers do not support candidates' campaigns, special interests and self-funding will likely dominate judicial campaign finance.

Two problems with the ABA's formulation of the rule may help to explain why no states have adopted it. First, in states with reasonable contribution limits, the potential for real or apparent corruption is largely addressed by the limits, which no individual may legally exceed. Under those circumstances, the ABA rule adds little or nothing to the campaign finance regime to protect a judge's impartiality. Those jurisdictions would be better served by a rule that triggers disqualification after receipt of aggregate contributions of a certain amount not from a single donor but collectively from all donors associated with a party to the litigation (such as corporate officers or employees) or with counsel (such as law firm partners who have given in their individual capacity). This modification of the rule would also augment its efficacy in jurisdictions that lack reasonable contribution limits.¹³¹

Second, the mandatory disqualification required by the ABA rule invites gamesmanship that could defeat its purpose. If the contribution threshold were set at a reasonable level, parties or lawyers could disqualify an unfavorable judge by making contributions (or aggregate contributions) above that amount to her campaign committee. To prevent such gaming of the system, either party should be permitted to waive disqualification. A waiver is preferable to requiring a motion for disqualification because it keeps the onus on the court to disclose campaign

128. See *supra* notes 94-99 and accompanying text.

129. See *supra* note 38 (citing recent empirical studies finding a significant correlation between campaign contributions and litigation success rates).

130. See *supra* note 94 and accompanying text.

131. In the Illinois race for Supreme Court at issue in *Avery*, for example, State Farm made *no* contributions to Karmeier, but individuals and entities closely associated with it contributed more than \$1 million to his campaign.

finance information.¹³²

4. Independent Adjudication of Disqualification Motions

The fact that judges in many jurisdictions decide on their own recusal challenges, with little to no prospect of immediate review,¹³³ is one of the most heavily criticized features of United States disqualification law—and for good reason. Recusal motions are not like other procedural motions. They challenge the fundamental legitimacy of the adjudication. They also challenge the judge in a very personal manner: they speculate on her interests and biases; they may imply unattractive things about her. Allowing judges to decide on their own recusal motions is in tension not only with the guarantee of a neutral decision-maker, but also with our explicit commitment to objectivity in this arena. “Since the question whether a judge’s impartiality ‘might reasonably be questioned’ is a ‘purely objective’ standard, it would seem to follow logically that the judge whose impartiality is being challenged should not have the final word on the question whether his or her recusal is ‘necessary’ or required.”¹³⁴

Against these arguments, several prudential objections are typically offered in favor of judges making their own recusal decisions. As one commentator sets out the core claims:

The primary benefit of the individual determination model is that the person with the best knowledge of the facts is the person who resolves whether the circumstances support recusal. Individual determination may also reduce the number of recusal “fishing expeditions” because parties will be reluctant to approach an individual [judge] with weak evidentiary support for a disqualification motion. The single-judge procedure also enhances judicial efficiency because it avoids prolonged fact-finding hearings before recusal decisions.¹³⁵

None of these critiques is wholly misguided, but we do not find them compelling. The challenged judge may have the best knowledge of the facts, but the very biases or conflicts of interest that prompted the challenge in the first place may prevent her from fairly evaluating the import of those facts. In addition, the judge may fear that granting a disqualification motion will send the signal that she is biased, even if she is not, and that it will raise questions about why she failed to recuse herself *sua sponte*.¹³⁶ “Fishing expeditions” should be deterred by the fact that the third-party decision-makers will be judges themselves, and so

132. Canon 3F of the 2004 ABA Model Code of Judicial Conduct appears to permit waiver when both parties agree to it. But requiring mutual consent perpetuates the potential for gamesmanship.

133. See *supra* notes 109-113 and accompanying text.

134. Olowofoyeku, *supra* note 60, at 69 (internal citations and quotations omitted). Recall that this objective standard is the centerpiece of modern American disqualification practice and has been codified into law nearly everywhere. See *supra* Part IV.A; *supra* note 53 and accompanying text.

135. Pearson, *supra* note 60, at 1833 (internal citations omitted).

136. See *supra* note 119.

will have a professional and personal interest in ensuring that such expeditions do not flourish.¹³⁷ (Sanctions might also be used for frivolous challenges.) And while independent adjudication of recusal motions does raise efficiency costs, those costs should not be substantial if decisions are based on written affidavits and oral argument, rather than full-blown adversarial hearings. The increased procedural integrity and public trust fostered by an independent decision-maker may be well worth the price.

5. Transparent and Reasoned Decision-Making

Judicial disqualification in many jurisdictions is something of a black box: there is no systematic record of how many disqualification motions are decided or on what grounds.¹³⁸ The failure of many judges to explain their recusal decisions, and the lack of a policy forcing them to do so, offends not only a basic tenet of legal process, but also a basic tenet of liberal democracy—that officials must give public reasons for their actions in order for those actions to be legitimate.¹³⁹ The lack of public reason-giving also creates less abstract problems: it stymies and distorts the development of precedent, it deprives appellate courts of materials for review, and it allows judges to avoid conscious grappling with the charges made against them. To remedy these problems, all judges who rule on a disqualification motion should be required to explain their decision in writing or on the record, even if only briefly.

6. De Novo Review on Interlocutory Appeal

The perfunctory abuse of discretion standard of review applied to recusal decisions in nearly every jurisdiction has drawn its fair share of critics.¹⁴⁰ Making appellate review more searching would be less important if the other reforms on this list were adopted, but it would still provide a valuable safeguard against partiality. It would also provide a measure of discipline for lower court judges, who would face a higher risk of disqualification—and the attendant professional embarrassment—for erroneous recusal decisions. The Seventh Circuit, the only

137. Indeed, one might argue that a challenged judge's colleagues are not independent enough to rule on her disqualification motion, on account of the collegiality and reciprocity pressures that they will likely face in such situations. One might therefore prefer the use of outside arbiters instead. We find this idea intriguing and not necessarily outlandish, but we do not address it here because of the deep practical and possibly constitutional concerns that any such scheme would raise.

138. See *supra* notes 113-115 and accompanying text.

139. See Frost, *supra* note 48, at 560-63, 569-70, 588-90 (describing public reason-giving as a core tenet of Legal Process theory and recommending its incorporation into the practice of judicial disqualification).

140. See, e.g., Paul B. Lewis, *Systemic Due Process: Procedural Concepts and the Problem of Recusal*, 38 U. KAN. L. REV. 381, 407 (1990) (critiquing the abuse of discretion standard for not providing meaningful protection against judicial misconduct); Stempel, *supra* note 110, at 661-62 (same).

federal appeals court to review recusal determinations *de novo*, might shed some light on how such enhanced review operates.¹⁴¹

In addition to adopting a more meaningful standard of appellate review, courts could improve their procedures for appeal. While the standard mechanisms for filing an appeal—interlocutory orders, motions for reconsideration, and post-trial petitions—all have a role to play, interlocutory orders offer litigants the earliest opportunity for relief. In jurisdictions in which independent adjudication of the recusal motion is not implemented at the trial court level, encouraging or requiring appellate courts to accept interlocutory orders in a timely manner (which rarely happens at present)¹⁴² may provide a second-best alternative.

7. Mechanisms for Replacing Disqualified Appellate Judges

The *Avery* case illustrates a problem with recusal procedures in states that do not designate a substitute for a disqualified appellate judge. If Justice Karmeier had agreed to step down from the case, his court would have split evenly, leaving the decision below intact. The potential for such even splits at the appellate level can raise serious problems of gamesmanship, and it undermines the precedential value of the resulting decisions. It is therefore important that regardless of which recusal policies they adopt, courts have in place mechanisms for efficiently replacing a disqualified judge.¹⁴³

8. Expanded Commentary in the Canons

Expanding the canon commentary on recusal would be a classic “soft” solution for regulating its practice. This reform would be of limited value, both because of the commentary’s weak legal stature and because the discussion cannot cover all possible situations. Nevertheless, it would be relatively costless to do, and it would promote adherence to higher ethical standards by clarifying when recusal is advisable, if not strictly required. The commentary could also be expanded to provide more examples of situations meriting disqualification—for instance, representative campaign statements that might reasonably be interpreted as indicating a commitment to a particular outcome in certain types of pro-

141. See FED. JUDICIAL CTR., *supra* note 51, at 65.

142. See *supra* note 93.

143. This problem has already received a great deal of attention at the federal level. See, e.g., *Cheney v. United States Dist. Court*, 541 U.S. 913, 915-16 (2004) (mem. of Scalia, J.); *Laird v. Tatum*, 409 U.S. 824, 837-38 (1972) (mem. of Rehnquist, J.); Ryan Black & Lee Epstein, *Recusals and the “Problem” of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75 (2005); Olowofoyeku, *supra* note 60, at 81-84; Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 748-50 (1973); Pearson, *supra* note 60, at 1806, 1836-37; see also *supra* note 110 (citing to representative critiques of United States Supreme Court recusal practices).

ceedings—which would make it tougher for judges to deny disqualification motions based on similar facts.¹⁴⁴

9. Judicial Education

Seminars for judges that enable them to confront the standard critiques of disqualification law might provide another soft solution for invigorating its practice. Judges could be instructed on the likely underuse and underenforcement of disqualification motions, the social psychological research into bias, the importance of avoiding the appearance of partiality, and so forth. These seminars might also review potential reforms to recusal doctrines and court rules. Beyond their specific teachings, simply having such seminars might help to foster a legal culture in which there is deeper awareness of disqualification law and its current flawed state.

B. An External Solution: Recusal Advisory Bodies

In some states in which there is heightened concern about the fallout from *White* and other pressures to abandon ethical standards, bar associations or other groups of volunteers have created committees to monitor judicial campaign conduct.¹⁴⁵ These groups serve both as a resource for candidates who want to take the high road, by offering them cover for the refusal to lower their standards, and as a source of corrective public education when advertising in judicial campaigns (by candidates, political parties, or interest groups) is false or misleading. The most effective committees have no official status; they work by drawing attention to problems and keeping participants in the electoral process accountable for their behavior.

A similar model might be followed with respect to recusal. Advisory bodies could identify best practices and encourage judges to set high standards for themselves. Judges could be encouraged to seek guidance from an advisory body when faced with difficult issues of recusal. A judge accepting such advice could expect a public defense if a disgruntled party criticized a decision not to recuse. In contrast, the

144. The ABA commission tasked with updating the Model Code of Judicial Conduct appears to have made some minor additions to the commentary on its disqualification provision, but much more could still be done. See ABA REPORT, *supra* note 66, at Rule 2.11: Reporter's Explanation of Changes (indicating that two new comments were added "to clarify that the disqualification rules apply regardless of whether a motion to disqualify has been filed" and "to elaborate on the meaning of 'economic interest'").

145. See Chief Justice Joseph E. Lambert, *Contestable Judicial Elections: Maintaining Respectability in the Post-White Era*, 94 KY. L.J. 1, 13 (2005) (summarizing the work of these committees in Alabama, Florida, Kentucky, and Ohio); *The Way Forward: Lessons from the National Symposium on Judicial Campaign Conduct and the First Amendment*, 35 IND. L. REV. 649, 655 (2002) (recommending the creation of official and unofficial campaign conduct committees "to help assure appropriate campaign conduct").

advisory body could disclose when a judge has ignored advice favoring disqualification. The publicity would create pressure for the judges to follow recusal recommendations or to specify clear reasons for their decision to sit on a case.

VI. CONCLUSION

We have by no means catalogued all of the possible changes to recusal doctrine and practice that could enhance the accountability of judges and protect their independence. But even the few proposals briefly outlined here could compensate for some of the evident weaknesses in current disqualification standards and help to protect the real and apparent impartiality of the courts. The challenge for elected judges, whose campaign supporters may well want them to rule on cases from which they should be disqualified, will be to overcome pressures to maintain the status quo. The rising attacks on the judiciary may provide the needed incentives for recusal reform.

We acknowledge that, although recusal reform is badly needed, it is less than a perfect solution to the problems arising in the aftermath of *White*. Recusal is an incomplete safeguard of judicial fairness and impartiality because it is an individualized, case-specific remedy and so protects only against harms to particular litigants. Front-end, systemic protections, such as canons prohibiting conduct that undermines real and perceived judicial impartiality, are ultimately preferable. But the fact is that as those protections are being scaled back or stricken, the back-end disqualification of judges who either are or appear to be biased is becoming all the more important as a protection of last resort. Invigorating recusal would help courts currently under siege to seize the high ground and recover the respect of a disenchanted public.